STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANDREW ANTHONY LEONARD, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANDREW KRYSZTOPANIEC,

Respondent-Appellant,

and

KIMBERLY JEANETTE LEONARD,

Respondent.

UNPUBLISHED
April 1, 2004

No. 247462
Wayne Circuit Court
Family Division
LC No. 95-325159

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Respondent-appellant Andrew Krysztopaniec appeals as of right from the order terminating his parental rights to the minor child, Andrew Leonard (d/o/b 6/12/01), under MCL 712A.19b(3)(i), (j), and (l).[1] We affirm in part and remand in part.

On November 27, 2001, a neglect petition was filed in circuit court regarding the minor child, Andrew Leonard, who was then five months old. It was alleged that the mother, Kimberly Leonard, had left Andrew with maternal relatives for over a month. Ms. Leonard had a history of heroin abuse, and had had her rights to two other children terminated, Matthew Leonard (d/o/b 7/21/99) and Christopher Leonard (d/o/b 2/7/94). Respondent-appellant was the legal father of Andrew and Matthew Leonard.

[1] The court also terminated the parental rights of the child's mother, Kimberly Leonard. She has not appealed.

An original petition for permanent custody of Andrew was filed in Wayne County on April 22, 2002. The petition alleged that the mother's whereabouts were unknown, the parents had failed to support and provide Andrew a safe and nurturing home, the mother had had her rights terminated as to Matthew, and respondent-appellant had failed to protect Matthew by allowing the mother to have contact with him. An amended petition was filed on May 21, 2002, adding allegations that respondent-appellant 1) failed to assist the mother in obtaining prenatal care, drug treatment, housing, or income, 2) neglected his fifteen-year-old daughter, Jennifer Kempisty, by failing to visit or support her, 3) had felony convictions for carrying a concealed weapon and possession with intent to deliver cocaine and marijuana, 4) failed to comply with the court-ordered treatment plan as to Matthew, and 5) failed to provide financial and emotional support and a safe and nurturing home for Andrew.

In the meantime, respondent-appellant's rights to Matthew were terminated in August, 2002.

At a hearing held on September 23, 2002, the court took evidence and determined that it was proper to take jurisdiction over Andrew with respect to the mother and respondent-appellant. Ms. Leonard testified that at present, she lived with her mother, although sometimes she stayed with her sister and sometimes with respondent-appellant. The dispositional hearing was held on December 10, 2002. Further testimony was taken on January 23, 2003, after the proofs were reopened to permit evidence of a positive drug test.

The court terminated respondent-appellant's rights to Andrew by written opinion in February 2003.

In August of 2003, this Court reversed the termination of respondent-appellant's parental rights to Matthew, finding that respondent-appellant had complied with his parent agency agreement (PAA) and there was not clear and convincing evidence to establish the grounds for termination, particularly that respondent-appellant would not protect Matthew from his mother. This ruling has not been appealed to the Supreme Court.

In the instant case, the court found that termination of respondent-appellant's parental rights was appropriate under MCL 712A.19b(3)(i) (parental rights to a sibling terminated due to serious and chronic neglect), (j) (reasonable likelihood of harm if child is returned to parent), and (l) (parental rights to another child terminated under Michigan or another state's child protection laws). The court also found termination to be in the best interests of the child.

Petitioner concedes that subsection (l) is no longer applicable due to this Court's reversal in Matthew's case. The same would also be true of subsection (i). Thus, the only subsection at issue is (j).[2] The lower court found there was "a reasonable likelihood, based on the conduct or

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[2] FIA's arguments deal with subsection (g) and (j). As noted above, however, the trial court did not rely on (g) in terminating the parental rights of respondent-appellant father. The child's attorney has made the same error. However, the trial court's opinion clearly states, "The mother, without regard to intent, failed to provide proper care or custody . . . and there is no reasonable

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capacity of the child's mother and father, that the child will be harmed if returned to the home of either parent. 712A.19b(3)(j)."

Termination of parental rights is appropriate where petitioner proves by clear and convincing evidence at least one ground for termination. *In re Trejo*, 462 Mich 341, 355, 612 NW2d 407 (2000). Once this has occurred, the court shall terminate parental rights unless it finds that the termination is clearly not in the best interests of the children. *Id.* at 353; MCR 3.977(J). This Court reviews the lower court's findings under the clearly erroneous standard. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). The trial court's decision on the best interests question is reviewed for clear error. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

Respondent-appellant argues that the lower court's decision constitutes clear error because the court (a) erroneously found that he missed his Clinic for Child Study appointment without explanation, when respondent-appellant testified he had a doctor's appointment that day, (b) correctly found that respondent-appellant missed three visits in a row with his son, but failed to note that respondent-appellant saw Andrew the last two visits before the hearing, (c) ignored the therapist's testimony that respondent-appellant badly wanted to be reunited with Andrew and was suffering considerable grief over the loss of Matthew, (d) ignored the fact that respondent-appellant testified he had not seen Ms. Leonard in over a year, had no interest in continuing their relationship, and that her unborn child could not be his, (e) considered irrelevant and prejudicial matters in finding that (1) respondent-appellant had a $40,000 arrearage in child support payments for Jennifer, and (2) respondent-appellant served a prison sentence on two narcotics cases many years ago; these convictions could not be used in a criminal case against respondent-appellant under MRE 403, 410, and 609(A). We disagree.

We find no error in the court's statement that respondent-appellant missed his Clinic for Child Study appointment on November 21, 2002 without explanation. Respondent-appellant states that he did explain that he had a doctor's appointment that day. However, he did not testify that he called and told the clinic why he would not be coming for the appointment. He merely testified that he called to reschedule, but was told that he would not be able to get an appointment before the hearing. Additionally, the court may have thought respondent-appellant's explanation less important than his action of choosing a doctor's appointment over his clinic appointment involving custody of Andrew.

Respondent-appellant also objects to the court stating that he missed three visits with Andrew without noting that he came to the last visits. The court's opinion does not refer to respondent-appellant missing three visits with Andrew, but instead states that respondent-appellant missed three consecutive therapy sessions.

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expectation that the mother will be able to provide proper care and custody within a reasonable time . . . 712A.19b(3)(g)." Emphasis added.

Respondent-appellant also asserts that the court ignored the testimony of the therapist that he grieved the loss of Matthew and wanted to be reunited with Andrew. That these facts were not mentioned in the court's opinion does not mean they were ignored. The court was citing the evidence that convinced it to make the decision to terminate respondent-appellant's parental rights. Of most importance regarding the therapist was the fact that respondent-appellant had missed two sessions in November, and the rescheduled session in the beginning of December, and had failed to respond to the therapist's letters, thereby effectively terminating his therapy.

Respondent-appellant next faults the court's review of evidence concerning his relationship with the mother. We note that the court's decision regarding Matthew, which was reversed by this Court, was rendered in August 2002. Additional evidence of respondent-appellant's involvement with the mother was presented after that date.

At the December 10 hearing, respondent-appellant first testified that the baby the mother was then pregnant with could be his. He also testified that he had not had sexual intercourse with her for a year. When questioned by the court, he clarified that because of that, the baby could not be his. Nonetheless, the court was not obliged to accept this testimony where there was other evidence of continued involvement.

The mother, testifying at the jurisdictional hearing on September 23, 2002, had stated that she was "on and off" living with her mother. When asked what "on and off" meant, she responded, "I sometimes stay with Andrew, my sister's, my mom." She later clarified that "Andrew" was respondent-appellant. At the July 19, 2002 hearing, which was a bench trial involving Matthew and a pretrial for Andrew, the mother's sister testified that two or three weeks earlier, she had been at an Alano club meeting with the sister, where respondent-appellant was also present, and when respondent-appellant saw a man talking to the mother, respondent-appellant went up to him and asked what he was doing. She testified that respondent-appellant "kinda jumped into the vehicle threatening [the man] and we called the police on him . . . ." There was also testimony regarding respondent-appellant having the mother's car in October 2002. Taking into account all the testimony, we reject the argument that respondent-appellant's testimony was ignored.

We also note that it was only as a result of therapy that respondent-appellant was able to distance himself at all from the mother. The fact that he effectively discontinued therapy is therefore a cause for concern.

Lastly respondent-appellant argues that the court erroneously considered his conviction and his arrearage with respect to another child. We disagree. Although not in themselves grounds for termination, these facts were fairly considered when considering all the evidence. Respondent-appellant's conviction for a drug related offense was made relevant when he tested positive for cocaine in December, 2002 shortly before the hearing. While the court stated that this one test was not clear and convincing evidence of drug addiction,[3] it was evidence that

[3] This observation was made in the context that respondent-appellant had been submitting to weekly screens for several months, and all had been negative.

respondent-appellant was not compliant with his treatment plan, and in light of the prior conviction, was cause for concern.

Respondent-appellant's substantial arrearage in child support for his older child was relevant to the extent that it showed that his arrearage with regard to Andrew was likely not the result of a misunderstanding, as he asserted.

We conclude that the evidence was sufficient to satisfy the statutory standard in subsection (j) by clear and convincing evidence. Respondent-appellant's positive cocaine screen, indicating cocaine use in December 2002, just over a week before the permanent custody hearing, respondent-appellant's ceasing to attend his counseling sessions, his missing a Clinic for Child Study appointment, and his missing visitations with Andrew despite knowing that Andrew looked forward to them, all support the court's finding. Further, although respondent-appellant may have been truthful in his testimony regarding the mother, given his documented dependence on the mother, and difficulty in breaking away from her, his failure to attend therapy sessions demonstrated a lack of commitment to regaining custody of Andrew, and was cause for concern regarding his ability to sever his relationship with the mother.

Lastly, on this record, there was no showing that termination was not in Andrew's best interests. However, in the interim since this record was closed and the case has been on appeal, the termination of respondent-appellant's rights to Matthew has been reversed. The current status of the proceedings concerning Matthew is not a matter of record here. If Matthew is living with, or will soon be living with, respondent-appellant, that fact would be relevant to whether termination is in Andrew's best interests. Thus, we remand for a determination whether, in light of Matthew's situation, termination of respondent-appellant's parental rights is in Andrew's best interests.

The determination that a statutory ground for termination exists is affirmed. The matter is remanded for a current determination of whether termination of respondent-appellant's parental rights to Andrew is in Andrew's best interests in light of whatever events have transpired with respect to Matthew. Such proceedings are to take place within forty-two days of the clerk's certification of this opinion, and a record shall be made and transmitted to this Court forthwith. This Court retains jurisdiction.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio